No. 94-197

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, individually and in her official capacity as Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; and RUSSELL S. GOULD, Director, California Department of Finance,

Petitioners,

v.

DESHAWN GREEN, DERBY VENTURELLA, and DIANA P. BERTOLLT, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE HOWARD JARVIS TAXPAYERS ASSOCIATION, AND THE ALLIANCE FOR AMERICA IN SUPPORT OF PETITIONERS

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, Mountain States Legal Foundation, the Howard Jarvis Taxpayers Association, and the Alliance For America respectfully submit this brief *amicus curiae* in support of Petitioners. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been filed with the Clerk of this Court.

Amicus Mountain States Legal Foundation ("MSLF") is a non-profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of the individual liberties enumerated in the United States Constitution, the right to own and use property, limited government and the free enterprise system. MSLF members include businesses and individuals who live and work in nearly every state of the country. A large number of the Foundations' members are California residents and taxpayers and share an interest on behalf of MSLF in the stability and reform of the California welfare system. Further, MSLF has participated before this court in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution, including *Adarand Constructors, Inc., v. Pena*, No. 93-1841, *certiorari* granted September 26, 1994.

Amicus Howard Jarvis Taxpayers Association ("HJTA") is a non-profit corporation organized under the

laws of the State of California. HJTA is comprised of some 200,000 California taxpayers and is organized for the purpose of advocating the reduction of taxes, including real property taxes and special taxes in all their myriad forms and mutations levied upon and paid by California citizens. HJTA is involved in civil litigation on behalf of its members and all California taxpayers to achieve its tax reductions goals.

Amicus Alliance For America is a fifty state network of nearly five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance believes that it is crucial to preserve independent state decision making, such as at issue in this case, in order to encourage states to explore new approaches to governmental problems.

Amici submit this brief because they believe their public policy perspective and litigation experience will provide an additional viewpoint with respect to the constitutional issues presented. By urging this Court to allow state governments to engage in creative regulatory techniques, *amici* are not advocating giving government a free hand at the expense of the enumerated Constitutional rights of the individuals. Rather, *amici* contend that the "unenumerated" rights revolution, as espoused by the lower court's herein, is having a major deleterious impact

on the self-determination and well-being of the states and their citizenry.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Green v. Anderson*, ___ F.3d ___ (9th Cir. 1994). The order of the District Court granting Respondents' motion for preliminary injunction is reported at 811 F. Supp. 516 (E.D. Cal. 1993).

STATEMENT OF THE CASE

The California State Legislature enacted a non-discriminatory statute that created a two-tiered welfare payment system which provides the same level of benefits to a new resident as received in the state from which he or she moved, for a limited time. Welfare and Institutions § 11450.03. California's statute neither penalizes the right of others to freely move interstate, nor denies them public assistance for any period of time. In the District Court, California aptly demonstrated the nature of the current economic crisis which it faces, to support a finding that a compelling governmental interest exists to allow such non-drastic efforts to alleviate the severe economic pressure on the State's budget.

Yet, the District Court and the United States Court of Appeals for the Ninth Circuit never allowed the statute to take effect because the lower courts believed this Court's decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969) means

that *any* differential treatment of welfare recipients based on length of state residency necessarily penalizes travel and, as such, cannot be justified by state budgetary concerns.

SUMMARY OF ARGUMENT

California's statute places such a minimal imposition on interstate travelers as to have an inconsequential impact on the constitutional right to travel. The Appellate Court's ruling herein so impugns California's sovereignty as to violate the Tenth Amendment to the United States Constitution.

ARGUMENT

I. THE STATE OF CALIFORNIA MUST BE ALLOWED TO PURSUE INNOVATIVE, NON-DISCRIMINATORY SOLUTIONS TO WELFARE REFORM

Amici submit that the right Respondents seek to enforce before this Court is not the constitutional right to interstate travel as they claim, but rather a "right" to pursue as high a welfare payment as possible. This case presents the Court with an opportunity to deal with an issue of exceptional constitutional importance: Is this "unenumerated" constitutional right to be so expanded as to impose imminent economic danger to state government by destroying its ability to manage public institutions for the benefit of all its citizens, even when the state

action is substantively neutral in its effect on the right to travel?

The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in so doing, occupies a position fundamental to the concept of our Federal Union. The Founding Fathers envisioned a national economic entity and this Court has given life to that vision. *See H.P. Hood and Sons v. Dumond*, 336, U.S. 525 (1949):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsmen shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Dennis v. Higgins, 498 U.S. 439, 449-50 (1991) (quoting *H.P. Hood & Sons, Inc., supra*, 539). Our economic system depends upon the free flow of *commerce* among the states.

Importantly, states have not been prevented entirely from regulating interstate commerce.

> States may regulate interstate commerce evenhandedly to effectuate a local public interest and . . . [the] effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a

> legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it would be promoted as well with a lesser impact on interstate activities.

Hughes v. Oklahoma, 441 U.S. 322, 331 (1979), citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Amici* submit that this case bears no relationship to the constitutional principles of comity and cooperation that underlie the Commerce Clause or the right to freely travel amongst the states. It has less to do with any attempted economic balkanization by California than with an effort by Respondents to seek a fundamental right to a higher welfare payment. The Constitution does not grant any person such an unfettered right, nor can Respondents cite the Court to any authority for such a proposition.

The Constitutional basis of the right to travel has never been fixed by this Court, but the right has been inferred to arise out of the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, The Fourteenth Amendment, Section a, U.S. Const. Amend. XIV, § (a), or the Commerce Clause, U.S. Const. Art. I, § 8(3). *See Atty Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 106 S.Ct. 2317, 2320 (1986).[1] Historically, abridgement of the constitutional

[1] Further, the Articles of Confederation had explicitly provided that "the people of each State shall have free ingress and egress to and from any other State." Art. IV, Articles of Confederation. However, the United States Constitution nowhere uses the phrase "right to travel." Similarly, this Court has never seen fit to elucidate and resolve the "recurring differences in

right to travel has involved attempts by state governments to solve a perceived social ill by limiting the right of citizens to traverse the state's boundaries, and withholding full rights of state residency to them once they cross the state's boundary.[2]

However, the Court has upheld certain state actions despite their incidental impacts upon the right to travel. *See, Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, 113 S.Ct. 753 (1993) (an anti-abortion organization's actions which had the effect of impeding or obstructing

emphasis within the [United States Supreme] Court as to the source of the constitutional right to interstate travel." *United States v. Guest*, 383 U.S. 745, 759. (*See also Shapiro v. Thompson, supra* at 630).

[2] This Court has struck down attempts by various states to give preferred treatment to their denizens of longer residence, *Zobel v. Williams*, 457 U.S. 55 (1982) (Alaska attempted to grant its long-term residents unequally large shares of royalties paid to the state for natural resources withdrawn from Alaska); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Connecticut attempted to deny welfare assistance to persons who have met residence requirements applicable in other contexts and all other eligibility requirements, but had not resided within the state for at least one year); and *United States v. Guest*, 383 U.S. 745 (1966) (Georgia attempted to restrict persons on the basis of their race from freely engaging in interstate travel and equally enjoying privately owned places of public accommodation); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (Arizona's one year county residency requirement for an indigent to receive nonemergency hospitalization or medical care at county expense operates to penalize indigents from exercising their constitutional right of interstate migration and must be justified by a compelling state interest.)

entrances and exits of a Virginia abortion services facilities were not a constitutional violation because the incidental effects from such demonstrations did not have the primary effect of depriving women of their right to interstate travel); *Nordlinger v. Hahn*, ___ U.S. ___, 112 S.Ct. 2326 (1992) (California's property tax system under which assessed value could increase at rate which was differential to realty owners did not violate a property owner's right to travel because any benefit was found to be merely incidental to an acquisition-value approach to taxation).

Thus, if impacts from government regulation of a person's right to travel are merely incidental to some other legitimate governmental activity, then review should center on whether there is a valid, plausible reason for the action. *Nordlinger, supra*, at 2332. In the present case, California's statute was carefully crafted to avoid a scheme that would operate as a penalty on interstate migration, and thus imposes no burden on the right to travel. The Statute is substantively neutral in its effect on the constitutionally-protected right to travel.

California's statute does not provide for an outright denial of eligibility for benefits such as that condemned in *Shapiro*, but instead is more akin to the residence requirement imposed by states on new residents wanting to qualify for in-state tuition, which this Court has upheld. *Vlandis v. Kline*, 412 U.S. 441, 453 (1973); *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), aff'd on

appeal, 401 U.S. 985 (1971).[3] The statute achieves its purpose of reducing state expenditures by temporarily limiting the level of welfare benefits to those who choose to move to California. As noted above, the statute does not prevent people from moving to California; it simply renders neutral, for a period of one year, one of the factors a person might consider when contemplating a move to California.[4]

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[3] In his dissent in *Memorial Hospital v. Maricopa County*, Justice Rehnquist raised the following concern:

> Since the Court concedes that 'some waiting period(s) . . . may not be penalties: one would expect to learn from the opinion [how] to distinguish a waiting period which is a penalty from one which is not. Any expense imposed on citizens crossing state lines, but not on those staying put, could theoretically be deemed a penalty of travel; the toll exacted from persons crossing from Delaware to New Jersey by the Delaware Memorial Bridge is a 'penalty' on interstate travel in the most literal sense of all. But such charges, as well as other fees for use of transportation facilities, such as taxes on airport users, have been upheld by this Court. It seems to me that the line to be derived from our prior cases is that some financial impositions on inter-state travelers have such indirect or inconsequential impact on travel, that they simply do not constitute the type of direct purposeful barriers struck down in *Edwards* and *Shapiro*. Where the impact is remote, the state can reasonably require that citizen bears some proportion of the State's costs in its facilities.

Memorial Hospital v. Maricopa County, 415 U.S. 250 at 284. *See also* Justice Harlan's dissent in *Shapiro v. Thompson*, 394 U.S. 618 at 661 (1969).

[4] It is generally concluded that one looks at the equal protection clause for enforcement of the right to travel. Killian, J.

No facts in the present case can give rise to even a suggestion that California is motivated by discrimination against out-of-state citizens. Neither in intent, nor in effect, does California's statute prohibit travelers from reaching California. As this Court held in the *Bray* case:

> But all that [abortion clinics and abortion organizations] can point to by way of connecting [antiabortion] groups with that particular right is the District Court's finding that '[s]ubstantial numbers of women seeking the services of [abortion] clinics in the Washington Metropolitan area travel interstate to reach clinics.' . . . *That is not enough.*

Id. (Internal citations omitted, emphasis added.) The Court reasons further that in considering whether there has been interference with the right to travel, it is necessary to judge the primary objective of the interfering actions. "[I]f the predominate purpose . . . is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right," then the interference becomes a proper object of remedy under federal law. *Id., citing United States v. Guest*, 383 U.S. 745, 760 (1966). This instruction is applicable to the present case.

In light of the budget crisis the State faces, California has undertaken good faith efforts to craft a scheme that

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Ed., *The Constitution of the United States of America, Analysis and Interpretations*, 1987, p. 1796 n. 5. "In reality, right to travel analysis refers to little more than a particular application of equal protection terms, state distinctions between newcomers and longer term residents." *Zobel v. Williams, supra* at 60, n. 6. *See also, Shapiro v. Thompson, supra*, at 633.

does not operate as a penalty on migration. Impetus for the statute came from the existence of continuing, severe economic and fiscal problems in California and the California Constitutional provision mandating a balanced budget. California Constitution, Article IV, Section 12(a). If these efforts have had the concomitant result of making travel to California more onerous, this result is merely an incidental impact of the kind analyzed in the *Bray* and *Nordlinger* cases, *supra*.

II. THE APPELLATE COURT'S DECISION IMPUGNS CALIFORNIA'S SOVEREIGNTY

The decision of the Court of Appeals herein, impugns the meaningful existence of state sovereignty, as enshrined in the Tenth Amendment. This becomes especially clear when the genesis of that amendment is reviewed. During the debate over the ratification of our Constitution, there was great concern that the new national government (including the judicial branch) would subsume the sovereignty of the individual states. An overly large and powerful national government, it was feared, would remove the people from direct participation in democratic government, which would ultimately have the potential for tyranny. For example, Brutus feared that

> it will be found that the power retained by individual states, small as it is, will be a clog upon the wheels of the government of the United States; the latter therefore will be naturally inclined to remove it out of the way.

Brutus, *Essay I* (October 18, 1787), from *The Anti-Federalist*, § 2.9.9 at 112.

Aware of this trepidation, James Madison tried to reassure the citizens of New York, repeatedly, in *The Federalist Papers*. For example, in *The Federalist No. 39*, he wrote that the new government's

> jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.

The Federalist No. 39 (January 16, 1788) at 194 (J. Madison) (Bantam Ed. 1982). As to the fear that the people would actually *prefer* the federal government, to the detriment of local authority, Madison wrote:

> But even in that case, the State governments could have little to apprehend, because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered.

The Federalist No. 46 (January 29, 1788) at 239 (J. Madison).

Because eight states ratified the Constitution with recommendations for further amendments, there was a strong impetus for a quick passage of a bill of rights. In 1791, the first ten amendments were ratified by the states, including the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

There is no question of the critical importance attached by the ratifiers of the Constitution to incorporating the protection of the Tenth Amendment. Now that the Tenth Amendment is enshrined in the Constitution, this Court is faced with the question of whether and how to apply it. It is not and never has been expected that the federal government, including the judiciary, would attempt to negate state sovereignty overnight. Over the years, however, there has been a trend to compromise, or minimize, the force of the Tenth Amendment in the face of serious short-term expediency.

This Court's expatiation on the Tenth Amendment found in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1986) has often been viewed as having cut back on the force of the Tenth Amendment. When writing the majority opinion in *Garcia*, Justice Blackmun was persuaded that many of the tests employed by previous courts for discerning the essential elements of state sovereignty were fundamentally flawed and could only lead to inconsistent results that lacked a guiding principle. The error with each of these tests, Justice Blackmun noted, is that because state governments have the legitimate ability to experiment in

> any activity that their citizens choose for the common weal. . . . Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary,' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.

Garcia, 469 U.S. at 546.

Rather than looking at governmental functions, the Court focused on

> principles of democratic self-governance. . . . If there are limits on the federal Government's power to interfere with state functions – *as undoubtedly there are* – we must look elsewhere to find them.

Garcia 469 U.S. at 547 (emphasis added).

The courts below concluded that under the principles established by *Shapiro*, even if the non-discriminatory purpose of California's statute was to " . . . conserve limited state funds in the hope that the state may do more for those who now and in the past have depended on the state, such a purpose, if laudable, is yet unconstitutional." (District Court Order, Petitioner's App. at 16.) As stated previously, California met its burden of demonstrating that the statute was necessary to achieve an overriding purpose to control government spending during an era of severe economic depression. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 284 (1974) (Rehnquist, J. dissenting.) Nevertheless, the court herein below substituted judicial surmise for legislative fact-finding and engaged in nothing less than the abdication of meaningful judicial review of a statute that only incidentally impacts the Constitutional aspects of interstate travel. The courts below have taken away from the citizens of California their right to hold elected officials

accountable not only for the state's welfare system, but for its economic stability as well.[5]

In this case, the unprecedented intrusion of the federal judiciary into local government and lawmaking in California represents an "extraordinary defect[] in the national political process." *State of South Carolina v. Baker*, 485 U.S. 505, 99 L.Ed.2d 592, 603 (1988). This is truly a regrettable consequence for a constitutional system which has catalogued the many benefits of federalism as including, *inter alia*, "a decentralized government that will be more sensitive to the diverse needs of a heterogenous society," the "increase[d] opportunity for citizen involvement in democratic processes" and the "allow[ance] for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. ___, 111 S.Ct. 2395, 2399 (1991) (citations omitted) Such a defective decision must be overturned.

III. THE APPELLATE COURT'S DECISION ADVERSELY IMPACTS OUR "REPUBLICAN FORM OF GOVERNMENT" AND THEREBY IMPLIEDLY VIOLATES THE TENTH AMENDMENT

Amici submit that another way of looking at the "structure" of federalism is through a comparison with

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[5] In addition, the language of the Tenth Amendment protects not only the states, but the people: "The powers not delegated to the United States by the Constitution, . . . are reserved to the States respectively, *or to the people*." The rights of the people, as protected in their state constitutions, have been violated as well. Internal affairs of the states are to be protected from usurpation. *Kansas v. Colorado*, 206 U.S. 46, 49 (1906).

republicanism. Professor Lawrence Tribe has suggested that the Tenth Amendment's protection of state sovereignty can be conceptualized through reliance on the Constitution's guarantee of a republican form of government. L. Tribe, *American Constitutional Law* at 398. To put it simply, Article IV, Section 4, provides that the "United States shall guarantee to every State in this Union a republican form of government." Tribe argues that:

> [i]f the courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guaranty clause might well provide the most felicitous textual home for that enterprise.

L. Tribe, *American Constitutional Law* at 398.

In determining what is meant by a republican form of government, it is helpful to look at the writings of James Madison. Madison was a champion of the cause of a federal republic. He saw the new union as being a republic which was partly federal and partly national in character. In *The Federalist No. 10*, Madison argued that a large confederate republic is superior to small independent states in fighting factionalism and the tyranny of the majority. Madison also recognized, however, the crucial importance of retaining a *federal* rather than a wholly *national* character in the new union. In *The Federalist No. 39*, he criticized the concept of a purely national government and the "*extent* of its powers." *The Federalist No. 39* (January 16, 1788) 194 (J. Madison) (emphasis in original). In a purely national government, he cautioned, "local authorities are subordinate to the supreme; and may be controlled, directed or abolished by it at pleasure." *Id.* To avoid this possibility, the union is structured so that the

local governments – the states – retain "a residuary and inviolable sovereignty over all other objects." *Id.*

States have long functioned as the governmental units most directly affecting the lives of individuals. *Amici* submit that a crucial reason for preserving independent state decision-making is to encourage states to explore new approaches to governmental problems. As noted by Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion):

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Independent innovation is particularly necessary in the case of government regulatory activities, such as public assistance regulation, because state experimentation can hasten the development of successful regulatory techniques. In this case California has merely made an attempt at welfare reform which is neutral in its impact on the constitutionally protected right to travel.

IV. THE PRINCIPLE THIS COURT ENUNCIATED IN *SHAPIRO* IS UNWORKABLE AND SHOULD BE MODIFIED

If *Shapiro* and its progeny compel invalidation of California's Statute, then those principles should be reconsidered. As this Court said in *United States v. Dixon*, ___ U.S. ___, 113 S.Ct. 2849, 2864 (1993):

> [W]hen governing decisions are unworkable or badly reasoned, 'this Court has never felt constrained to follow precedent.'

(quoting *Payne v. Tennessee*, 501 U.S. ___, 111 S. Ct. 2597, 2600 (1991). *See also Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (White, J., dissenting):

> It is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken. The Court has therefore, adhered to the rule that *stare decisis* is not rigidly applied in cases involving constitutional issues . . . and has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution.

Id. at 786-88.[6]

The result of the District Court and the Ninth Circuit opinions following *Shapiro* and its progeny is that California is precluded from arguing legitimate budgetary concerns as a sufficient state interest to sustain a nondiscriminatory, durational residency requirement relating to public assistance expenditures. California has

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[6] *See also, Brown v. Board of Education*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938), *overruling Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Cf, Graves v. New York*, 306 U.S. 466, 491-92 (1938) (Frankfurter, J., concurring) (stating that "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.").

made an attempt at welfare reform that is merely neutral in its impact on the right to travel. In light of the inflexibility *Shapiro* mandates towards legitimate state interests, the principles of *Shapiro* are unworkable and should be reconsidered.

Thus, this Court should reexamine whether some impositions on interstate travelers have such an indirect or inconsequential impact on travel that they simply do not constitute the type of direct, purposeful barriers to travel that justify bankrupting a state government charged with providing services to all of its residents.

CONCLUSION

California is mandated to provide services to all of its residents. These services include public education, the state judicial system, the state highway system, medical services, the correctional system, fire and police protection, and a licensing system that regulates many important privately provided goods and services. All of these important governmental services are competing for limited financial resources. The action by the State of California under Welfare and Institutions § 11450.03 in this instance is substantively neutral in its effect on the constitutionally protected right to travel. *Amici* submit that this Court must restore the right of the People to hold elected officials accountable for the State's welfare system. Without such action, Government, its employees and those it

serves will suffer as the judicially created fiscal crisis over funding of the welfare system continues.

Respectfully submitted,

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